SOUTHERN UTAH WILDERNESS ALLIANCE

IBLA 90-151 Decided May 22, 1990

Appeal from a decision of the Price River Resource Area Manager, Bureau of Land Management, approving geophysical exploration under EA UT-066-89-37.

Affirmed.

1. Administrative Authority: Generally--Administrative Procedure: Administrative Review--Appeals: Generally--Federal Employees and Officers: Authority to Bind Government--Rules of Practice: Appeals: Generally

   A decision by a BLM officer which does not fall within any of the exceptions enumerated in 43 CFR 4.410 or provided by other duly promulgated regulation is subject to appeal to the Board of Land Appeals and a BLM official is without authority to state otherwise.

2. Administrative Procedure: Administrative Review--Appeals: Generally--Rules of Practice: Appeals: Dismissal

   An appeal from a decision approving geophysical exploration on land within and adjacent to a wilderness study area will not be dismissed as moot even though the challenged action had occurred, where issues raised by the appeal are capable of repetition, and where failure to decide the appeal would cause substantial issues to evade review.

3. Administrative Procedure: Administrative Review--Appeals: Generally--Rules of Practice: Appeals: Generally

   BLM is required to transmit the relevant case file within no more than 10 business days after receipt of a notice of appeal.

4. Minerals Exploration--Oil and Gas: Generally

   Oil and gas geophysical exploration on public lands, the surface of which is administered by BLM, requires BLM approval.

5. Administrative Procedure: Administrative Review--Appeals: Generally--Minerals Exploration--Oil and Gas: Generally--Rules of Practice: Appeals: Generally

When a protest against a notice of intent to conduct geophysical operations has been filed or an appeal has been filed from a decision to allow such operations, BLM is obliged to inform the party filing the notice
of intent that the notice cannot be processed until
the protest and any appeal therefrom has been resolved.

6. Environmental Policy Act--Environmental Quality: Environmental Statements--Minerals Exploration--
National Environmental Policy Act of 1969: Environmental Statements--Oil and Gas: Generally

A determination that a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of environmental problems has been made, relevant areas of environmental concerns have been identified, and the final determination is reasonable. A party challenging the determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Mere differences of opinion provide no basis for reversal of BLM's decision if it is reasonable and supported by the record on appeal.

7. Federal Land Policy and Management Act of 1976: Wilderness--Minerals Exploration--Oil and Gas: Generally--Wilderness Act

While Congress has prohibited the Secretary from issuing mineral leases for lands within a wilderness study area under 30 U.S.C. § 226-3(a) (Supp. V 1987), Congress also provided that nothing in this section shall affect any authority of the Secretary to issue permits for exploration by means not requiring construction of roads or improvement of existing roads if such activity is conducted in a manner compatible with the preservation
of the wilderness environment. 30 U.S.C. § 226-3(b) (Supp. V 1987).

APPEARANCES: Scott Groene, Esq., Salt Lake City, Utah, for appellant.

OPINION BY ADMINISTRATIVE JUDGE BYRNES

Southern Utah Wilderness Alliance (SUWA) has appealed from a decision of the Price River, Utah, Resource Area Manager, Bureau of Land Management

(BLM), approving a final environmental analysis (EA), record of decision, and finding of no significant impact (FONSI) concerning proposed geophysical exploration by Frontier Exploration Company (Frontier) near and in the Desolation Canyon Wilderness Study Area (WSA). 1/ Frontier's proposal was set forth in a notice of intent to conduct oil and gas exploration operations which was filed on August 7, 1989, pursuant to 43 CFR 3151.1. That regulation requires parties seeking to conduct oil and gas geophysical exploration on public land outside of Alaska to file a notice of intent which BLM is required to process within 5 working days. However, that regulation further provides: "If the notice of intent cannot be processed within 5 working days of the filing date, the authorized officer shall promptly notify the operator as to when processing will be completed, giving the reason for the delay."

On August 9, 1989, BLM informed Frontier that it could not process the notice within 5 working days because the line fell within Desolation Canyon WSA, and that exploration within a WSA can be approved only if it satisfied the nonimpairment standard of BLM's wilderness interim management policy (IMP). BLM informed Frontier that an EA must be made available for a 30-day public comment period and that a minimum of 60 days would be required before approval could be given.

Although the proposal called for six seismograph lines totaling about 28 miles, less than 5 miles of these lines would be within the WSA. BLM's Federal Register notice described the project as including the use of a helicopter to transport drilling equipment, on-site drilling operations, the use of below-ground explosives, and placement of seismic monitoring equipment. 54 FR 38907 (Sept. 21, 1989).

Appellant has requested expedited review of this appeal, asserting that BLM has refused to stay its decision approving the proposed action
as required by 43 CFR 4.21(a) which provides as follows:

> Except as otherwise provided by law or other pertinent regulation, a decision will not be effective during the time in which a person adversely affected may file a notice of appeal, and the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending the decision on appeal.

SUWA asserts that it telephoned the Area Office on November 13,
1989, to ensure that the action would be stayed, but was told that the proposed action had already commenced on November 10. SUWA then delivered
a request to BLM and the Regional Solicitor that exploration be stopped,
and on November 16, 1989, BLM notified appellant that the exploration work planned for the WSA would be stopped but the exploration work outside the WSA would be permitted to continue. Appellant states that 17 miles of line outside the WSA is within an area proposed for wilderness status by legislation pending in Congress.

1/ A similar appeal filed by the Utah Wilderness Association was later withdrawn and dismissed by the Board by order dated Jan. 10, 1990.

Appellant states that "BLM contends that the partial and tardy stay was completely discretionary and that the public had no right to either 1). a period in which to file a notice of appeal before the decision was implemented or 2). a stay once a notice of appeal was filed" (Statement of Reasons (SOR) at 3). Having filed no response, BLM does not dispute appellant's characterization of its actions.

[1] It appears that BLM's determination to put the decision into effect immediately without providing the right of appeal may have been motivated by its view that it lacked authority to do otherwise, at least with respect to the land outside the WSA. BLM expresses such a view in that portion of the EA concerned with the "no-action" alternative: "This alternative would be outside the BLM's jurisdiction to impose unless the proposed action and all other alternatives would be in violation of federal law" (EA at 4). In Utah Wilderness Association, 80 IBLA 64, 91 I.D. 165 (1984), vacated on other grounds, Utah Wilderness Association v. Clark, Civ. No. 84-0472 J (D. Utah Dec. 16, 1985), we considered another appeal in which a Utah BLM manager considered his decision to be unappealable because he believed that the nondiscretionary nature of his action placed it beyond this Board's jurisdiction. We held:

> This Board, not the District Manager, is the arbiter of its jurisdiction, pursuant to provision of 43 CFR 4.410. The Moab District Manager is bound by law to conduct adjudications in accordance with this regulation. Since his decision does not fall within any of the exceptions enumerated in 43 CFR 4.410 [or provided by other duly promulgated regulation], it is subject to appeal and the District Manager is without authority to state otherwise.

80 IBLA at 66, 91 I.D. at 167.

[2] To the extent that BLM has recognized that activity within the WSA should be suspended, however, it would first appear that appellant is suffering no adverse effect warranting expeditious resolution. Nor would expeditious consideration provide any remedy for activity on land outside the WSA that has already occurred. Indeed, appellant recognizes that this aspect of its appeal is vulnerable to dismissal for mootness but nevertheless asserts that the Board should review the appeal because it raises issues "capable of repetition, yet evading review," citing our decision in Southern Utah Wilderness Alliance, 111 IBLA 207, 210 (1989). 2/

2/ In Utah Wilderness Association, 91 IBLA 124 (1986), the Board dismissed an appeal as moot because the drilling activity against which the appeal was directed had already taken place. However, in Blackhawk Coal Co. (On Reconsideration), 92 IBLA 365, 369, 93 I.D. 285, 287 (1986), we stated: "An appeal is properly dismissed as moot only if the Board can provide no effective relief." The Supreme Court has recognized that the United States may seek relief from those who use and occupy public land without proper authorization, even though they have been advised by employees of the

There is no indication that the appeal is moot with respect to the land within the WSA. As for land outside the WSA, appellant raises not only the substantive issue of whether BLM properly approved seismic exploration but also the procedural issue of whether BLM was empowered to allow such activity to take place pending resolution of an appeal. When BLM unilaterally determines to exclude certain categories of decisions from appellate review, BLM's implementation of one such decision provides no basis for dismissal of an appeal therefrom as moot. On the contrary, the Board can only look upon such a circumstance as raising an issue capable of repetition that will evade review unless expeditious consideration is granted.

[3] We must also express our extreme disfavor with BLM's failure to transmit the case record in this appeal until after the protested action occurred. The case record was not received until January 3, 1990, more
than 2 months after the issuance of the decision that was appealed and
1-1/2 months after appellant's SOR was received. This Board has previously stated that BLM should transmit the relevant case file to this Board within no more than 10 business days after receipt of a notice of appeal. Thana Conk, 114 IBLA 263 (1990); Robert M. Perry, 114 IBLA 252 (1990); Utah Chapter Sierra Club, 114 IBLA 172, 175 (1990)(citing with approval BLM Manual 1841.15 A). We leave to BLM to determine what remedial management action may be warranted to correct such a situation.

[4] We are not aware of any provision of law which places the approval or disapproval of geophysical operations on public land outside the scope of BLM's regulatory authority. Congress has specifically made the use of the public lands subject to this Department's regulatory authority, see 43 U.S.C. §§ 1201, 1701, 1732 (1982), and BLM's own regulations explicitly state: "Geophysical exploration on public lands, the surface of which is administered by the Bureau, requires Bureau approval." 43 CFR 3150.0-1.

Although the regulation governing the procedure for exploration outside of Alaska requires no permit, no operator may lawfully conduct such operations until BLM has processed a notice of intent. 43 CFR 3151.1 Although that regulation requires BLM to process the notice of intent and notify the operator of practices and procedures to be followed within 5 working days, the regulation also requires BLM to notify the operator if processing cannot be completed within that time. 3/

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fn. 2 (continued)
Government that their use of the land was proper. Utah Power & Light Co., v. United States, 243 U.S. 389 (1917). Thus, even where an activity has already occurred it does not necessarily follow that no relief can be provided.

3/ Frontier's proposal was properly deemed to fall within the definition of oil and gas geophysical exploration set forth in 43 CFR 3150.0-5. We note that that definition does not include core drilling for subsurface geologic information or drilling for oil and gas inasmuch as those activities must be authorized by the issuance of an oil and gas lease and the approval of an application for a permit to drill. Id. BLM makes clear

[5] Unlike the oil and gas operating regulations published at 43 CFR Part 3160, no regulation provides that decisions made pursuant to the authority of 43 CFR Part 3150 are excepted from the automatic stay provision of 43 CFR 4.21(a). 4/ In Sierra Club, Oregon Chapter, 87 IBLA 1, 6-7 (1985), the Board explained the effect of that regulation in an appeal from the denial of a protest against the issuance of a geothermal lease:

> The regulations * * * provide that "a decision will not be effective during the time in which a person adversely affected may file a notice of appeal, and the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending the decision on appeal." 43 CFR 4.21(a). When an appeal from a decision of a BLM official is properly filed by an adversely affected party, that official loses jurisdiction over the case and has no authority to take any action on the case until jurisdiction is restored by Board action disposing of the appeal. Any adjudicative action taken by BLM after an appeal has been filed relating to the subject matter of the appeal is a nullity because BLM is acting without jurisdiction. Similarly, any BLM action taken to implement a decision during the period in which a party adversely affected may file a notice of appeal is improper and may be set aside. Petrol Resources Corp., 65 IBLA 104, 108 (1982); James W. Smith, 44 IBLA 275, 281 (1979). Accordingly, the issuance of the geothermal resources leases during the time when appellant had a right to appeal was improper. Thus, the leases are subject to cancellation. Lawrence H. Merchant, 81 IBLA 360 (1984). [Footnote omitted.]

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fn. 3 (continued)
that "the regulations in this part, however, are not intended to prevent drilling operations necessary for placing explosive charges, where permissible, for seismic exploration." The proposal to use explosives precludes its characterization as "casual use." See 43 CFR 3150.0-5(b).

4/ The Board construes exceptions to 43 CFR 4.21(a) narrowly. In Sierra Club, 108 IBLA 381, 384 (1989), we considered whether an appeal from a FONSI for a road-improvement project involving an RS 2477 right-of-way arose under 43 CFR Part 2800 so as to be exempt from the automatic stay provided by 4.21(a). We held:

"Reviewing the facts of the case in this context, we find that this is not an appeal of a decision regarding a right-of-way issued by BLM under the regulations at 43 CFR Part 2800. Rather, this is an appeal of a FONSI for a road improvement project and a determination that the associated impacts on the public lands do not merit the imposition of restrictions on the scope of the project other than those noted in the FONSI. This decision was reached by BLM pursuant to its responsibilities under NEPA [National Environmental Policy Act] and under FLPMA [Federal Land Policy and Management Act of 1976] to avoid unnecessary and undue degradation of the public lands. Hence, the decision is properly construed to be stayed pending resolution of any timely filed appeal. 43 CFR 4.21(a)."

Accordingly, we conclude that when a protest against a notice of intent to conduct geophysical operations has been filed or an appeal has been filed
from a FONSI with respect to such operations, BLM is obliged to inform the party filing the notice of intent that the notice cannot be processed until the protest or any appeal therefrom has been resolved.

[6] Having determined that BLM improperly allowed the exploration to occur outside the WSA during the pendency of the appeal, we now review the merits of BLM's determination that Frontier's proposal would result in no significant impact. In Hoosier Environmental Council, 109 IBLA 160 (1989), Sierra Club, 107 IBLA 96 (1989), and Glacier-Two Medicine Alliance, 88 IBLA 133 (1985), we held that a determination that a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of environmental problems has been made, relevant areas of environmental concerns have been identified, and the final determination is reasonable. A party challenging the determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Id. Mere differences of opinion provide no basis for reversal of BLM's decision if it is reasonable and supported by the record on appeal. Id.

After the publication of BLM's Federal Register notice, a number of comments were filed. SUWA contended that the draft EA did not address the need for a full inventory of archaeological and historical sites prior to an undertaking. SUWA contended the potential cumulative impacts to archaeological and other resources were not adequately addressed by the draft EA, and that the draft EA failed to consider the potential for increased pot hunting which may result from greater access and presence of the exploration crew. SUWA stated its disagreement that the proposed action would
not impair the wilderness values within the WSA, citing its concern that
the statutory requirements of sections 302(b) and 603(c) of FLPMA are met and that the nonimpairment standard of BLM's interim management policy for lands under wilderness review is upheld.

In response to SUWA's concerns about archaeological and historical sites, BLM made the geophysical exploration subject to a stipulation requiring the operator to hire a consulting archaeologist to inventory
all lines and staging areas where surface disturbances have not previously occurred, and that no seismic operations on any particular segment of the proposed lines could be done until the archaeologist has completed his survey of that segment. The operator would be required to avoid or mitigate impacts to cultural resources located by the survey as determined by the Area Manager, and to monitor such values to ensure that the seismic operations do not affect the resources present. BLM made no specific response to SUWA's concern about the statutory or IMP violations, citing the lack of specificity in SUWA's comment.

Other comments were filed resulting in significant modifications of Frontier's proposal. We find the final EA prepared by BLM to be exemplary

in its treatment of the issues posed by the geophysical exploration proposal and in its cooperative resolution of the concerns raised in the comments. For example, the Division of Wildlife Resources of Utah's Department of Natural Resources filed comments containing a number of detailed and specific objections concerning the effect of the proposed action upon wildlife. The State, BLM, and Frontier were able to agree upon a stipulation to accommodate these concerns.

The final EA evaluated Frontier's proposal and several alternatives. The description of the proposal stated that road access would be provided but indicated that helicopters would be employed in all areas within the WSA and in rugged terrain outside the WSA. Buggies would be used only on the bench and flat ridge tops outside WSA's which are accessible to vehicle travel. Frontier proposed that excess cuttings from drill holes be raked out from the holes to blend in with the ground.

Alternative 1, the selected action, involved modifications to the proposed action which included mitigation measures developed through the EA process. Although drilling and shooting would be allowed inside the WSA, measures were taken to diminish effects on vegetation and all excess drill cuttings would be hauled off the site.

BLM rejected the other alternatives as unduly restrictive. Alternative 2 allowed no drilling and shooting within the WSA, but provided for the laying by hand of cable and geophones inside the WSA. Under Alternative 3, there would be no activity within the WSA, but seismic line would be located outside the WSA as proposed. Under Alternative 4, the no-action alternative, no seismic lines would be located and run.

[7] We note that while Congress has prohibited the Secretary from issuing oil and gas leases for lands within a BLM WSA, 30 U.S.C. § 226-3(a) (Supp. V 1987), Congress also provided that

> nothing in this section shall affect any authority of the Secretary of the Interior * * * to issue permits for exploration for oil and gas * * * by means not requiring construction of road or improvement of existing roads if such activity is conducted in a manner compatible with the preservation of the wilderness environment.

30 U.S.C. § 226-3(b) (Supp. V 1987).

Although BLM did not refer to this statutory provision, the EA sets forth the following discussion concerning the effect on wilderness:

> Based on anticipated impacts and mitigation, a determination of nonimpairment to wilderness value is recommended for Alternatives 1 (modified proposed action), 2 (limited activity within the WSAs), 3 (no activity within WSAs), and 4 (no action). The reasoning for Alternatives 1 and 2 is stated below:

a. The activity would be temporary, with activities expected to be completed within 30 days. The helicopter would be audible to rafters of the Green River for the eastern portions of exploration. However, operations would be during a period of low rafting activity.

b. No long-term impacts to naturalness, solitude, and primitive, unconfined recreation are anticipated within the wilderness study areas. When mitigation is applied, all impacted soils and vegetation would not recover completely by September 1990. All soil compaction would not have completely disappeared and the size and density of all impacted perennial vegetation would not be that of predisturbance levels. However, the appearance to the casual observer would be substantially unnoticeable. The soil surface would assume a natural appearance after minor amounts of washing of loosened material. The area of actual vegetation disturbed would be small and virtually confined to grasses, forbs, and the smaller shrubs. The cumulative disturbance would not alter the larger picture of vegetative patterns, especially in the sparse understories of the pinyon-juniper woodlands.

Alternative 1 would be slightly more impacting than Alternative 2, with 0.4 more acres of disturbance anticipated.

Appellant's description of the effects of seismic exploration does not appear to take into account the mitigating measures developed by BLM during the process of preparing the EA, and constitutes merely an expression of a difference of opinion, something which we have previously held provides no basis for overturning BLM's conclusion. Although BLM erred when failing to stay its action pending appeal, we find that BLM's finding of no significant impact was correct and that BLM properly approved the geophysical exploration. 5/

5/ Under 43 CFR 4.413, an appellant is required to serve a copy of his notice of appeal and of any SOR on each "adverse party" named in BLM's decision. The purpose of this requirement is to allow the adverse party the opportunity to defend the correctness of BLM's decision by filing an answer, as provided by 43 CFR 4.414. Beard Oil Co., 105 IBLA 285, 287 (1988). An "adverse party" to an appeal is one who will be disadvantaged if the appellant prevails before the Board. Id. Clearly, Frontier is an adverse party to the extent that appellant seeks reversal of BLM's decision to approve its geophysical operations. Nevertheless, Frontier was not named as an adverse party to be served in BLM's decision, probably because BLM did not appear to consider the approval of geophysical exploration to be a matter subject to appeal. Nevertheless, inasmuch as we affirm BLM's decision, our decision does not adversely affect Frontier and we see no point in withholding our decision so that Frontier may be brought into this appeal.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

James L. Byrnes
Administrative Judge

I concur:

Franklin D. Arness
Administrative Judge